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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE STATE OF ARIZONA, AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by the Attorney General of the State of Florida, counsel for the Petitioner, and by Theodore Klein, Esq., counsel for the Respondent. A letter of consent of both parties has been filed with the Clerk of this Court. State governments are not required to obtain consent to file as *amici curiae.*

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of the AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.

2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.

3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime.

The State of Arizona is represented by its Attorney General, an elected and constitutional official who is the chief legal officer of his State and charged with the responsibility of protecting the legal rights and interests of the citizens of his State.

Our particular interest in this case arises from the fundamental and far-reaching policy issue involved—the articulation and protection of the legitimate interests of law enforcement agencies in the investigation and prosecution not only of drug traffickers, but of those who pose a threat to the safety of air travelers and also criminal suspects in general who can be identified and apprehended by use of suspect profiles and composite sketches. It is our belief that a failure of the Court to reverse the ruling of the District Court of Appeal of Florida, Third District, *en banc*, 389 So. 2d 1007 (Fla. App. 1979), and the ruling of the Supreme Court of Florida denying the State's application for review, will threaten the use of legitimate and necessary law enforcement techniques extending beyond the facts of this case.

ARGUMENT

I.

THE RULING BELOW IS IN ERROR AS IT MAY AFFECT THE USE OF DRUG COURIER PROFILES TO ESTABLISH REASONABLE SUSPICION OR PROBABLE CAUSE, AND IT SERIOUSLY THREATENS THE USE OF PROFILES IN THE HIJACKER DETECTION SYSTEM SO VITAL TO PUBLIC PROTECTION.

This case directly involves four issues that are of grave importance to state and federal law enforcement officers: (1) whether the mere approach of a police officer constitutes a detention-stop; (2) whether the facts in this case constituted a stop and arrest; (3) whether all profile transactions are illegal no matter what the facts are, under *United States* v. *Mendenhall,* 446 U. S. 544 (1980) and *Reid* v. *Georgia,* 448 U. S. 151 (1980); and (4) whether the consent and search in this case were invalid.

We will limit our consideration in this brief to certain issues and related questions that can reasonably be expected as progeny of the rulings of the District Court of Appeal of Florida, Third District, *en banc,* and the Supreme Court of Florida, if upheld by this Court.

As is our custom when appearing as *amici curiae* before this Court, we will not reiterate at any length the legal arguments made by the State of Florida in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, as already stated, address only the important policy issue raised in this case, and its impact upon the effectiveness of law enforcement nationwide.

The question of reasonable suspicion based upon articulable facts under the common law stop and frisk authority of *Terry* v. *Ohio*, 392 U. S. 1 (1968), is one of exceptional importance to the state and federal governments in view of the large quantities of narcotics flowing into airports such as Miami from other cities in the Western Hemisphere, most of which is bound for destinations in the United States, such as New York City, Detroit, and Chicago. The situation in Miami is repeated at many airports around the country, as indicated by cases such as *United States* v. *Ballard*, 573 F. 2d 913 (5th Cir. 1978), *United States* v. *Elmore*, 595 F. 2d 1036 (5th Cir. 1979), and *United States* v. *Mendenhall*, 596 F. 2d 706 (6th Cir. 1979), *rev.*, 446 U. S. 544 (1980), which involved the use of drug courier profiles by federal narcotics agents. *Reid* v. *Georgia*, *supra*, indicates that the technique and its legal implications are of importance to state law enforcement personnel as well.

The basic characteristics and operation of the drug courier profile are described in varying degrees of detail in *Mendenhall* (U. S. Supreme Court and Sixth Circuit Court of Appeals opinions) and *Reid*, and will not be further described here except to note that the typical characteristics of suspects in such profiles are complex and multitudinous, sometimes involving "primary characteristics" and "secondary characteristics" as described in footnote 3 to the opinion in *Elmore*, *supra* (595 F. 2d 1036, 1039). As can readily be seen, deliberate application of such complex class characteristics requires the skill and concentration of a trained law enforcement officer, and by no means can it be said that such an officer, if properly applying the profile to a given suspect, is acting on a mere "hunch" or "guess". Indeed, such proper application must be conceded to involve the kind of "articulable suspicion" approved as the basis for the exercise of the Fourth Amendment stop and frisk power of law enforcement officers articulated first in *Terry* v. *Ohio*, *supra*.

It is important to note that construction of the profile is based not upon someone's imagination of what drug couriers must look like and their characteristics, but upon what drug couriers *in fact* look like and their *actual* characteristics, as revealed by the real-life experience of trained law enforcement officers, accumulated over a period of time and memorialized in the drug courier profile. See, *Mendenhall* (U. S. Supreme Court and Sixth Circuit Court of Appeals opinions), *Reid, Ballard* and *Elmore, supra.*

The use of the drug courier profile is analogous to two other important law enforcement activities that *amici* wish to bring to the attention of the Court, as was done in the AELE brief in *United States* v. *Mendenhall,* 446 U. S. 544 (1980). The first is the profile that has become a standard part of the total antihijacking procedures implemented by industry and the federal Government to stem the tide of aircraft hijacking and pirating that has resulted in great loss of lives and destruction of property. See, 37 Fed. Reg. 2500, *et seq.* These procedures involve, in progression: (1) a "profile" that consists of observable characteristics which, based upon the experience of law enforcement officers, distinguishes potential hijackers from the public in general—not unlike the nature and use of the drug courier profile involved in the instant case; (2) electronic weapons detectors (magnetometers); (3) interviews by airline employees or law enforcement officers, similar to the interviews conducted by law enforcement personnel after the drug courier profile has triggered an investigatory stop; or (4) frisks or searches of passengers and/or baggage. See, LaFave, 3 Search and Seizure 332 (1978); 14 ALR Fed. 286, Anti-Hijack Measures—Validity.

In the cases that have examined the constitutionality of such procedures, beginning with the use of the profile and a progression to the magnetometer, interview, and weapons frisk, the courts have upheld such techniques generally upon the basis of the Fourth Amendment stop and frisk powers articulated in

Terry v. *Ohio, supra.* See, *e.g., United States* v. *Lopez,* 328 F. Supp. 1077 (N. Y. 1971); *United States* v. *Ruiz-Estrella,* 481 F. 2d 723 (2nd Cir. 1973); *United States* v. *Epperson,* 454 F. 2d 769 (4th Cir. 1972); and also, *United States* v. *Davis,* 482 F. 2d 893 (9th Cir. 1973) (validating such procedures upon authority upholding administrative searches pursuant to a regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation). In these cases the courts have focused upon the governmental interest justifying the intrusion, concluding that the extreme danger of a hijack or destruction of property constitutes an "exigent" circumstance justifying an exception to the general warrant requirement.

The second analogous law enforcement activity is the use of composite drawings or sketches to identify and apprehend an unknown suspect in the commission of a crime. The majority of the cases that have discussed such composite drawings have involved the issue of admissibility of the drawings at trial. Such evidence has usually been excluded as hearsay. See, cases collected at 42 ALR 3d 1217, Admissibility—Composite Police Sketch. However, even though such evidence has generally been ruled inadmissible at trial, it has been recognized as having validity in the formation of *reasonable suspicion or probable cause* for Fourth Amendment arrest purposes. See, *People* v. *Griffin,* 272 N. E. 2d 477 (N. Y. 1971); *State* v. *Ginardi,* 268 A. 2d 534 (N. J. App. 1970) (where a composite was compiled by a standard police device known as an "Identi-Kit" consisting of hundreds of transparent celluloid overlays representing variations of human physiognomy); and *Commonwealth* v. *McKenna,* 244 N. E. 2d 560 (Mass. 1969). Thus, although the courts are split on the issue of the admissibility of such evidence at trial, usually excluding it on the basis of the hearsay rule, it has been recognized as valid and reliable for Fourth Amendment purposes.

Amici submit that both of the foregoing accepted and perfectly proper law enforcement investigative techniques—so absolutely necessary—are threatened by the ruling of the District Court of Appeal of Florida, Third District, *en banc*, and the Supreme Court of Florida, with respect to the use of the drug courier profile for investigatory stops founded on reasonable suspicion or even probable cause to arrest.

Can it be realistically said, that the confluence of a large number of drug courier profile characteristics, based upon the experience of trained officers in numerous *actual cases* resulting in convictions, and coming together in one suspect at the same time and place, is "consistent with innocent behavior", such that a *per se* rule is justified for excluding the profile as the basis for reasonable suspicion or probable cause?

It is submitted that the presence of a substantial number of the profile characteristics in one suspect, such as the use of small denomination bills for ticket purchases, travel to and from major drug import centers, staying for short periods of time, the absence of luggage or use of empty suitcases, nervousness, use of an alias, etc., taken together, would lead any reasonable person having special knowledge of the *modus operandi* and characteristics of interstate drug couriers to believe that such a person is a drug courier and *requires* a prudent law enforcement officer to stop and inquire of such person. As the Court in *United States* v. *Carrizoza-Gaxiola*, 523 F. 2d 239, 241 (9th Cir. 1975) stated, "[f]ounded suspicion requires some reasonable ground for singling out the person stopped as one who was involved or is about to be involved in criminal activity." Reasonable men would agree that even though any one, or a few, of these facts and characteristics taken together might be consistent with innocent behavior, the combination of several simply would not be consistent with innocent behavior.

Certainly the courts that have considered the use of the hijacker profile in finding a sufficient Fourth Amendment basis to stop and inquire, would not have agreed with the rationale of the District Court of Appeal of Florida, *en banc*, and the Supreme Court of Florida, in refusing to assign a common-sense value to the use of profiles in the reasonable suspicion-probable cause equation. Although in such cases the profile was considered *in combination* with another element of an investigatory nature, namely the activation of a magnetometer, before an inquiry was made, the profile is an essential element in itself of reasonable suspicion sufficient to undertake the sort of limited intrusion into a suspect's privacy sanctioned by *Terry* and its multitudinous progeny. Failure to accord approved legal status to the use of properly constructed and properly administered suspect profiles in drug courier cases will jeopardize the use of similar profiles in hijacker cases and will seriously disrupt the nation's air safety program.

II.

THE RULING BELOW ALSO THREATENS THE USE OF COMPOSITE SKETCHES TO ESTABLISH REASONABLE SUSPICION OR PROBABLE CAUSE.

As noted *supra*, and in the AELE brief in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), many courts have recognized the value of composite sketches in the investigation of crime and the apprehension of suspects, regardless of the inadmissibility of such materials at trial under the hearsay rule. One respected commentator noted the effectiveness and utility of such sketches thusly:

> The policeman, by means of skillful questioning, and by trial and error, is able to produce a detailed drawing which the witness states is an accurate representation of the face of the perpetrator of the crime. This drawing is then reproduced in large numbers and given to police officers so as to enable them to recognize the suspect, should they

> happen to see him. Sometimes, where the crime is a very serious one, copies of the drawing are given to the newspapers, which publish them in an effort to alert the public. Often, criminals who might otherwise have gone free are recognized and arrested because of these drawings. Wall, Eye Witness Identification in Criminal Cases 169-170 (1965).

One of the most commonly used systems of composite sketches is the so-called "Identi-Kit". It consists of hundreds of celluloid overlays conforming to typical human features such as hairline, nose, eyes, chin contour, mouth, etc. A composite is usually put together by a trained law enforcement officer and it is then frequently circulated to law enforcement personnel in the field who will attempt to compare the composite sketch to persons they observe. If a specific comparison is made, and a trained law enforcement officer reasonably believes that a person matches the composite, reasonable suspicion to stop and inquire, or even probable cause to arrest, may exist.

In *State* v. *Ginardi*, 268 A. 2d 534 (N. J. App. 1970) an "Identi-Kit" was used to prepare a composite sketch of a suspect and the defendant's arrest was made on the basis of a "striking likeliness" of the defendant to the drawing, without any other suspicious circumstances being present. The Court stated:

> It is clear from the record that the Hamilton police had probable cause to believe that defendant was the man who had attacked Elaine and Susan and were justified in arresting and detaining him. 273 A. 2d 534, 541-542.

Amici respectfully submit that a legitimate law enforcement investigatory tool is threatened by the ruling of the Florida courts in this case. The similarities between the use of profiles and composite sketches—the attempt to isolate and identify suspects by the use of common characteristics—require a holding by this Court, one that will clarify the issues raised

and decided in *Mendenhall* and *Reid*, that profiles and composite sketches may be the basis for reasonable suspicion and probable cause.

Indeed, many police departments have carried the use of composite sketches produced by the "Identi-Kit" method one step further by coupling the Kit with *modus operandi* files in a system called "IDMO" to produce mug shots of potential suspects. See 20 Am Jur Proof of Facts 539, Eye-Witness Identification, Section 13. All such legitimate investigatory techniques are threatened by the holding of the courts below. Law enforcement agencies, state and federal, will not be able to identify and apprehend suspects in thousands of cases where investigatory stops founded on reasonable suspicion, and arrests founded on probable cause are presently recognized by the courts.

CONCLUSION

The decisions of the District Court of Appeal of Florida, Third District, *en banc,* and of the Supreme Court of Florida, should be reversed as they pertain to the issue of the use of the drug courier profile as a basis for reasonable suspicion and probable cause, because they are unwarranted under the facts of this case and any reasonable application of Fourth Amendment principles, as well as on the basis of sound public policy.

Respectfully submitted,

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